STATE OF CALIFORNIA,

Petitioner,

vs.

JOHN ANTHONY GREEN,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

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IN THE

Supreme Court of the United States

October Term, 1968
No. .....

STATE OF CALIFORNIA,

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vs.

JOHN ANTHONY GREEN,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

The State of California, requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case on March 21, 1969.

Opinions Below

The opinion of the Court of Appeal rendered on August 16, 1968, and reported as *People v. Green,* 265 A.C.A. 1, 71 Cal. Rptr. 100, is set out as Appendix C. The granting of a hearing on October 9, 1968 by the California Supreme Court vacated that opinion. The opinion of the California Supreme Court reversing respondent's conviction, rendered on March 21, 1969, is reported as *People v. Green* (1969) 70 A.C. 696, 75 Cal. Rptr. 782, 451 P. 2d 422 and is set out in Appendix B.

Jurisdiction

The opinion of the California Supreme Court issued on March 21, 1969. On June 18, 1969, an order was entered extending the time for filing the petition for writ of certiorari to and including July 11, 1969 and, by further order, extended to July 25, 1969. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. section 1257(3), and Rule 22 of the Rules of the Supreme Court of the United States, since a right has been especially set up and claimed under the Constitution of the United States.[1]

Questions Presented

1. Do the holdings of this Honorable Court in *Pointer v. Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 and *Barber v. Page,* 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255, prohibit the states from adopting rules of evidence permitting admission of prior testimony and inconsistent statements for the truth of the matters asserted of a witness who is present in court and subject to cross-examination by counsel for defendant?

2. Does the Confrontation Clause of the Sixth Amendment, as construed in *Barber* and other recent decisions of this Court prevent adoption by the states and the Federal Courts of rules of evidence in accord with modern and enlightened legal

[1]Although the decision of a state appellate court reversing a judgment ordinarily remands the matter to the lower court for retrial, this Honorable Court recognized in *Miranda v. Arizona* (*Stewart v. California*), 384 U.S. 436, 497-498, that under California law in the event of an acquittal on retrial the state could not appeal and under such circumstances the decision of the California Supreme Court constituted a final judgment under 28 U.S.C. 1257(3).

authority permitting the admission for the truth of the matters asserted prior testimony and inconsistent statements of a witness who is present at the trial and subject to cross-examination and scrutiny as to demeanor by the trier of fact?

Statutes Involved

The constitutional and statutory provisions are set forth in the Appendix A. They are:

United States Constitution, Sixth Amendment;
California Evidence Code sections 770 and 1235.

Statement

History of the Case

In an information filed by the District Attorney for the County of Los Angeles, respondent was accused of violating section 11532 of the California Health and Safety Code, furnishing, selling, and/or giving of a narcotic (marijuana) to a minor. (Cl. Tr. p. 1.[2]) Respondent entered a plea of not guilty and waived trial by jury. (Cl. Tr. pp. 2, 4.) He was found guilty, and his motion for a new trial was denied. Proceedings were suspended and respondent was granted probation for five years. One of the conditions of probation was that he serve one year in the county jail. He filed notice of appeal from the order granting probation. (Cl. Tr. pp. 9, 10.) Thereafter the Court of Appeal reversed the conviction on the ground that Evidence Code section 1235, which permitted the introduction of testimony given at a preliminary hearing for the truth of

[2]Cl. Tr. refers to the clerk's transcript of the proceedings in the Superior Court of the County of Los Angeles in and for the State of California. A certified copy of said transcript is filed with this court.

the matter asserted by a witness at the trial, was unconstitutional. (See Appendix C.) The petition of the People for a hearing on the constitutional issue in the California Supreme Court was granted, and following argument on the constitutional issue regarding the application of the confrontation clause of the Sixth Amendment, the California Supreme Court reversed the judgment on the ground that there was error of a constitutional dimension in the admission of such prior inconsistent statements and that this holding was "impelled" by decisions of this Honorable Court (*See* Appendix B). The decision of the California Supreme Court was rendered on March 31, 1969.

Factual Statement

In January of 1967, Melvin Porter, the minor to whom respondent was charged with furnishing the narcotic, was then age 16 years and had known the respondent for over four years. (Rep. Tr. pp. 11, 12.[3])

Porter acknowledged having used LSD (acid) a number of times and had been using marijuana about two or two and a half months prior to his arrest in late January, 1967. (Rep. Tr. p. 13.) At the trial, he testified that shortly after New Year's 1967, the respondent Green had called Porter at Porter's home and told Porter that he had some "stuff" that he wanted Porter to sell. (Rep. Tr. pp. 13-15.) Porter at the trial testified that he did not recall whether Green brought something into the house on the day of the telephone call because he, Porter, was under the influence of LSD. (Rep. Tr. pp. 16, 17.)

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[3]Rep. Tr. refers to the reporter's transcript of the proceedings had in the Superior Court below. A certified copy of this transcript is filed with the court.

At this point the People, pursuant to Evidence Code sections 1235 and 770, were permitted to impeach this testimony and to introduce for the truth of the matter asserted the testimony of Porter at the preliminary hearing in which Porter stated that respondent Green had told Porter in a conversation that he had a kilo of marijuana, that he was selling, and that marijuana came in 29 "baggies" in a large shopping bag. (Rep. Tr. pp. 19, 20.)

Porter at the trial stated that he could not recall how he had testified at the preliminary hearing, but that his testimony at that time was the truth as he believed it. (Rep. Tr. pp. 20-21.) At the trial Porter maintained that he could not recall how he came into possession of the marijuana but that he did come into possession of 29 "baggies." (Rep. Tr. pp. 25-26.) He sold a few of the baggies and the rest were stolen from his closet. (Rep. Tr. p. 27.) Among the sales Porter made of this marijuana was a sale to Officer Dominguez. (Rep. Tr. p. 28.) At the trial, Porter testified that someone told him where he could find the marijuana but that he was not certain who the person was or where the marijuana was found. (Rep. Tr. pp. 29-30.)

At this time, Porter was again impeached by the reading of his testimony on cross-examination at the preliminary hearing. At that hearing, Porter testified that respondent Green came into his home, told him that he had some "Grass" or marijuana to sell, and that Green told him that the marijuana could be found at Green's father's home. (Rep. Tr. pp. 31-36.)

At the trial, Porter testified that he was telling the truth at the time he testified at the preliminary, that he guessed that the reading of the questions and answers

refreshed his recollection. (Rep. Tr. pp. 23, 36.) Porter stated that of his own knowledge, with his recollection refreshed, he guessed he obtained the marijuana from the back yard of Green, and that Green told him where the marijuana could be found. Porter sold some of the marijuana and gave the proceeds to Green. (Rep. Tr. pp. 36-37.)

Officer Barry M. Wade, a police officer for the City of Los Angeles, assigned to the Juvenile Narcotics Division, had a conversation with Porter at the Juvenile Division Headquarters on January 31, 1967. Officer Wade testified that Porter was sober at that time. (Rep. Tr. p. 42.) Porter told Officer Wade that Green called him in the morning and stated that he had a kilo of marijuana and wanted to know if he (Green) could leave it at Porter's house. Green came to Porter's house later with a brown shopping bag containing 29 baggies of a green leafy substance which Porter recognized as being similar to marijuana. (Rep. Tr. pp. 56-57.) This conversation was introduced for the truth of the matter asserted pursuant to Evidence Code sections 1235 and 770. (Rep. Tr. p. 43.) It was stipulated at the trial that Porter said to Officer Wade that on previous occasions during the five months preceding his arrest Green brought large quantities of marijuana to Porter's home for storage and that Porter used a portion of this and paid Green therefor; that Porter sold marijuana to buyers who came to his home from the marijuana stored by Green and turned the money over to Green. (Rep. Tr. pp. 105-106.)

Officer Ramon Dominguez, during January of 1967, was acting as an undercover officer attempting to purchase marijuana from narcotic sellers. During this period he purchased marijuana from Porter. (Rep. Tr. p. 62a.) Officer Dominguez's testimony as to an appointment with Green was limited to the purpose of showing that Green and Porter had previous associations and were acquainted. (Rep. Tr. pp. 67-76.)

As part of the defendant's case, the witness Porter was called for further cross-examination. Porter testified that he had set up an appointment between Dominguez and Green. (Rep. Tr. p. 81.) He testified that he had talked to Officer Wade about buying some narcotics from Green and that he might have said Green wanted to store it at his home. (Rep. Tr. p. 83.) He testified that in January, 1967, he had told a Mr. Blackmore that he was going to get even with Green for repossessing a car which Green had sold him. (Rep. Tr. p. 85.)

On cross-examination, Porter testified at the trial that Green wanted to sell Officer Dominguez $500 worth of peat moss if Dominguez wanted "grass" or baking soda if he wanted "acid." (Rep. Tr. p. 81.) On redirect examination, Porter admitted that Green brought over marijuana on different occasions. (Rep. Tr. p. 86.)

Green testified on his own behalf at the trial, stating that he had sold a car to Porter in 1966 which Porter failed to pay for and which he had repossessed. (Rep. Tr. pp. 107-108.)

Green testified that Porter called him in January and said that he thought he had sold marijuana to a police officer and asked Green to talk to the suspected officer to determine whether he was in fact an undercover agent. Porter gave him (Green) the idea that he should attempt to sell the officer $500 worth of peat moss. Green testified that as a result of his conversation he (Green) called Officer Dominguez and at Porter's request arranged a meeting at the hot dog stand where the conversation to which Officer Dominguez had testified took place. Green testified that he had put aspirin in the coke because he assumed that an officer would not consume narcotics. (Rep. Tr. pp. 108-110.) Green denied that he sold marijuana to Porter, stating that on several occasions Porter had offered marijuana to smoke but that he had refused. He said that he was familiar with the going price of narcotics because he had heard persons talk about it. (Rep. Tr. pp. 128-129.)

REASONS FOR GRANTING THE WRIT

I

The California Supreme Court Has Misinterpreted the Holdings of This Honorable Court as to the Scope of the Confrontation Clause and Has Improperly Held That It Was "Impelled" to Hold Unconstitutional a State Statute Permitting the Admission of Prior Testimony and Inconsistent Statements of a Witness for the Truth of the Matters Asserted in a Case in Which the Defendant Was Afforded Full Confrontation of the Witness at the Trial

The petitioner contends that the California Supreme Court has misinterpreted the holdings of this Honorable Court articulating the scope of the Right of Confrontation contained in the Sixth Amendment and that the California Court has improperly held unconstitutional California Evidence Code section 1235.[4]

The Sixth Amendment to the Constitution of the United States, held applicable to the states in *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him.[5] *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255, held that the right of confrontation includes both the opportunity to cross-examine and the occasion for the jury (trier of fact)

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[4]California Evidence Code section 1235 provides:

"Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." (*See* Appendix A.)

[5]The California Constitution has no similar provision. *See* California Penal Code section 686, California Evidence Code 711.

to weigh the demeanor of the witness. The California Supreme Court, relying upon the above authorities, has held that this Honorable Court does not permit the introduction of prior inconsistent statements of a witness made at a preliminary hearing because of the limitations upon the states imposed by the confrontation clause. The People of the State of California, petitioner herein, respectfully submit that this Honorable Court has *not* so interpreted the confrontation clause as to limit the power of the State Legislatures in enacting legislation permitting the admission of prior statements at trial of a witness who is available for cross-examination and whose demeanor is subject to the scrutiny of the trier of fact.

In the instant case, the witness Porter confronted the defendant Green at trial, was subject to cross-examination and his demeanor in testifying was subject to the scrutiny of the trial judge who was the trier of fact; in fact he was available and was called for further cross-examination during the defendant's case-in-chief. The prior testimony introduced as an inconsistent statement pursuant to California Evidence Code Section 1235 was given at a preliminary hearing, at which hearing the defendant Green was also confronted by the witness Porter and through his counsel was afforded full opportunity to cross-examine the witness under oath.

The People of the State of California submit that the California Supreme Court has misinterpreted the holdings of this Honorable Court in *Pointer v. Texas, supra,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, and *Barber v. Page, supra,* 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255, and that this court has

not held that the prior statement of a witness available at trial for cross-examination and confrontation is inadmissible because of the provisions of the United States Constitution.

In *Pointer v. Texas, supra,* the witness who had testified at the preliminary hearing was not available at the trial for confrontation and cross-examination, and in that case the defendant, because of lack of counsel at the preliminary hearing, was denied the meaningful cross-examination by counsel required by the confrontation clause of the United States Constitution.

In *Barber v. Page, supra,* likewise, the declarant did not confront the defendant at the trial and no effort had been made to procure his presence for confrontation and cross-examination at the trial prior to the introduction of the testimony taken at the earlier hearing. Accordingly, this Honorable Court held that there had been a denial of confrontation.

In *Douglas v. Alabama,* 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934, this Honorable Court made it clear that it is the right of cross-examination that is a primary interest secured by the Confrontation Clause and that the clause was to prevent depositions and ex parte affidavits being used in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing his recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge of his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

See also: Mattox v. United States, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 2d 489.

As was implicit in this Honorable Court's holding in *Harrington v. California,* 37 U.S. Law Week 4472, decided June 3, 1969, where the declarant was present in court and testified and was subject to cross-examination by counsel for the defendant, no denial of the right of confrontation was presented. This had been the holding in the Court of Appeal, Ninth Circuit, prior to the decision in *Harrington. See: Rios-Ramirez v. United States,* 403 Fed. 2d 1016, 1017, certiorari denied April 1, 1969, 89 S. Ct. 1292; *Santoro v. United States,* 402 Fed. 2d 920, 922-923 (9th Cir. 1968).

Likewise this court has recognized the rule admitting prior identification as substantive evidence similar to the rule on a prior communication of a witness who is available for cross-examination at trial.

Gilbert v. California, 388 U.S. 263, 272 (Footnote 3), 87 S. Ct. 1951, 18 L. Ed. 2d 1178.

The California Supreme Court attributed its holding in the instant case to recent rulings of this Honorable Court. In the opinion below the Court said, at page 701, 70 A.C.:

> ". . . . Our decision was *impelled* by recent cases articulating the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. (E.g., Pointer v. Texas (1965) 380 U.S. 400; Barber v. Page (1968) 390 U.S. 719.)" (Emphasis added.)

Despite the decisions to which reference is made herein, the California Supreme Court said that this Honorable Court has held that the opportunity for cross-examination before the ultimate trier of fact was not satisfaction of the "contemporaneous" confrontation mandate of the Sixth Amendment because it was "not an adequate substitute for the right to cross-examination contemporaneous with the original testimony before a different tribunal." In explanation of this interpretation the California Court said (70 A.C. at 703-704):

> "The import of *Barber* and other recent Supreme Court decisions was spelled out in *Johnson*:[6] These rulings emphasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, *i.e.*, before the same trier who sits in judgment on the truth of the witness' direct testimony as it is spoken from the stand. (Italics in original.) (*People v. Johnson* (1968), *supra*, 68 Cal. 2d 646, 659, 660.) We reiterate that the 'contemporaneous' cross-examination which alone, in the absence of a legal showing of necessity, can be considered fully effective and constitutionally adequate is cross-examination at the *same time* as the direct testimony is given, before the *same trier* as must ultimately pass on

[6]*People v. Johnson* (1968), 68 Cal. 2d 646, 69 Cal. Rptr. 599, 441 P. 2d 111, cert. denied 1969, 89 S. Ct. 679. The California Supreme Court recognized that *Johnson* differed in a significant respect. In *Johnson*, a proceeding by indictment, the accused did not have the confrontation afforded in the instant case at the earlier hearing.

> the credibility of the witness and the weight of that testimony. In short, cross-examination neither may be nunc pro tunc nor may it be tunc pro nunc.[4]" (Footnote omitted.)

Petitioner herein contends that this Honorable Court has *not* held that admission for the truth of the matters asserted of prior statements of a witness at the trial who testifies and is subject to cross-examination violates the Confrontation Clause or "impels" holding unconstitutional a state statute permitting the admission of such evidence. As will be briefly noted *infra,* II, respected and forward-looking authorities has proposed such a rule from a practical and astute appreciation of the problem of achieving a more enlightened and realistic ascertainment of the truth while preserving fundamental and essential safeguards.

In the instant case the means of testing the veracity of the witness was achieved and the right of confrontation was assured the accused both at the preliminary hearing *and* at the trial.

There was no denial of the Right of Confrontation and the California Court was wrong in its interpretation of the holdings of this Court. It is urged that the need for an authoritative decision from this Honorable Court on the subject is demonstrated.

II

The Confrontation Clause of the Sixth Amendment, as Construed by This Honorable Court in Barber and Other Recent Decisions, Does Not Prohibit the States or the Committee on Rules of Evidence of the Judicial Conference of the United States[7] From Adopting Rules Admitting Prior Statements of a Witness Who Is Subject at Trial to Cross-Examination in Accord With Modern and Enlightened Authorities; a Compelling Necessity Requires the Grant of Certiorari to Give Authoritative Guidance to the States and in the Exercise of Supervisory Power Over the Federal Courts

The State of California, petitioner herein, contends that the misinterpretation of this Honorable Court's holdings on the scope of the Confrontation Clause by the California Supreme Court may prevent admission in evidence of relevant prior statements of witnesses at the trial, as well as precluding admission in evidence of past recollection recorded and other exceptions to the hearsay rule; that such a misinterpretation could prevent adoption of enlightened and progressive legislation and rules of evidence by the various states and by the Federal Courts. Eminent authorities have recognized the worth of the rule of evidence enacted in California Evidence Code section 1235 in the ascertainment of the truth at trial, and a brief discussion thereof will be made.

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[7] *See* discussion *infra*, in regard to the Proposed Rules of Evidence for the Federal District Courts and Magistrates.

The American Law Institute Model Code of Evidence Rule 503(b) permits admission in evidence of hearsay declarations if the judge finds that the declarant is present in court and subject to cross-examination.

Rule 63(1) of the Uniform Rules of Evidence provides for the admissibility of previous statements made by a person who is present at the hearing and is available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness. The commissioners of the Uniform Code comment that this adopts the American Law Institute Model Code of Evidence and note that this rule has the support of modern decisions which have held that evidence of prior consistent statements of a witness is not hearsay because the rights of confrontation and cross-examination were not impaired and that court decisions have admitted evidence of prior inconsistent statements for its full value not limited merely to impeachment. The commissioners further note that when sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay.

The Court of Appeal in Kentucky in a recent decision, *Jett v. Commonwealth,* reported in 436 S.W. 2nd 788, at 792, refers to the direct and sensible approach set forth in the Model Code of Evidence and the Uniform Rules of Evidence.

See also: Gelhaar v. State (Wis., 1969), 163 N.W. 2d 609, 612-614.

Professor McCormick in his work on Evidence, section 39, pp. 73-82, presents compelling arguments in

support of the rule codified in California Evidence Code section 1235. Among the many advantages of such a rule he notes that it effectively deals with the "turncoat witness" and permits introduction of the more reliable earlier statements since they are made nearer in time to the event related. He points out that the important requirement of confrontation, cross-examination, is present and that this is the most essential safeguard.

Wigmore, who first approved the orthodox view on the subject, has in the latest edition concluded that the natural and correct solution is to admit prior inconsistent statements as having affirmative testimonial value when the witness is present and subject to cross-examination.

III Wigmore, section 1018, pp. 687-688.

See also Ladd, *Impeachment Of One's Own Witnesses —New Developments,* 4 U. Chi. L. Rev. 69 (1936); Maguire, Evidence, *Common Sense and Common Law,* at pages 59-63 (1947); McCormick, *The Turncoat Witness: Previous Statements As Substantive Evidence,* 25 Texas L. Rev. 573 (1947); Morgan, *The Hearsay Dangers and The Application of The Hearsay Concept,* 62 Harv. L. Rev. 177 (1948) at 192-196; Morgan, *The Law of Evidence,* 1941-1945, 59 Harv. L. Rev. 481 (1946), at 545-555.

The Second Circuit Court of Appeals, speaking through Judge Friendly in *United States v. De Sisto* (1964), 329 Fed. 2d 929, cert. denied, 377 U.S. 979, gave substantive effect to a prior identification of the accused to supply an element in support of a jury verdict. Squarely faced with the question of the evidentiary

status of prior inconsistent statements, the court well stated the position of petitioner at page 933:

> "The rule limiting the use of prior statements by a witness subject to cross-examination to their effect on his credibility has been described by eminent scholars and judges as 'pious fraud,' 'artificial,' 'basically misguided,' 'mere verbal ritual,' and an anachronism 'that still impede(s) our pursuit of the truth.' [Citations omitted.] The sanctioned ritual seems peculiarly absurd when a witness who has given damaging testimony on his first appearance at a trial denies any relevant knowledge on his second; to tell a jury it may consider the prior testimony as reflecting on the veracity of the later denial of relevant knowledge but not as the substantive evidence that alone would be pertinent is a demand for mental gymnastics of which jurors are happily incapable. Beyond this the orthodox rule defies the dictate of common sense that 'The fresher the memory, the fuller and more accurate it is. * * * Manifestly, this is not to say that when a witness changes his story, the first version is invariably true and the later is the product of distorted memory, corruption, false suggestion, intimidation, or appeal to sympathy * * * [but] the greater the lapse of time between the event and the trial, the greater the chance of exposure of the witness to each of these influences.' McCormick, Evidence 75-76 (1954). . . ."

See also United States v. Armone (2nd Cir. 1966), 363 Fed. 2d 385 [De Sisto followed]; *United States v. Schwartz* (E.D. Pa. 1966), 252 F. Supp. 866, and also Judge Learned Hand's discussion in *Di Carlo v.*

United States (1925), 6 Fed. 2d 364, cert. denied, 268 U.S. 706, espousing the principles later adopted in California Evidence Code section 1235.

In March of 1969, the Advisory Committee on Rules of Evidence presented to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates. These rules would admit the evidence that the California Supreme Court has held inadmissible under the holdings of this Honorable Court. It is petitioner's contention that the exercise of the supervisory power over the Federal Judiciary presents another compelling reason for the grant of the petition in this case.

In discussing the proposed rules the Advisory Committee said (46 F.R.D. 161, 336-337):

> "Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:
>
> " 'Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely non-existent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be

> influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.' Comment, California Evidence Code § 1235. See also McCormick § 39.
>
> The Advisory Committee finds these views more convincing than those expressed in People v. Johnson, 68 Cal. Reptr. 599, 441 P. 2d 111 (1968). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements."

The need for a declaration on this important question by this Honorable Court is evident. The final arbiter of the scope of the commands of the Federal Constitution on the states and Federal Courts is this Court.

The California Supreme Court has said the result reached by it in the instant case was "impelled" by the decisions of this Court interpreting the Confrontation Clause of the Sixth Amendment. If this is incorrect,

but permitted to stand as an interpretation of this Court's holdings on the question, the Committee on Evidence for the Federal Courts may be deterred from fully considering this sensible and enlightened rule of the modern progressive authorities. If the California Court is right, the authorities heretofore cited to the contrary, this Court should also speak on the matter to properly supervise the proceedings that may occur in the Federal Courts in event of the adoption of this rule.

This Honorable Court has recognized and has consistently refused to abdicate its obligation, particularly in the exercise of supervisory power over the Federal Courts, to decide questions involving Federal Constitutional issues in order that the lower Federal Courts and the Courts of the various states may conform their behavior to the commands of the Constitution.

It is respectfully submitted that a hearing is required in this Honorable Court in order that guidance may be given to the state and Federal Courts and it is requested that the petition for certiorari be granted.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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WILLIAM E. JAMES,
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Attorneys for Petitioner.

APPENDIX A

United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence. [sic.]"

California Evidence Code section 770

§770. Evidence of inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or

(b) The witness has not been excused from giving further testimony in the action. (Stats. 1965, c. 299, §770.)

California Evidence Code section 1235

§ 1235. Inconsistent statement. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770. (Stats. 1956, c. 299, § 1235.)

APPENDIX B

Opinion of the Supreme Court of the State of California

In the Supreme Court of the State of California, in Bank.

The People, Plaintiff and Respondent, v. John Anthony Green, Defendant and Appellant. Crim. 12753.

Filed March 2, 1969.

Defendant John Anthony Green was convicted of violating Health and Safety Code section 11532 (furnishing a narcotic to a minor) upon evidence consisting chiefly of the testimony and prior inconsistent statements of the minor to whom defendant allegedly furnished narcotics. Defendant challenges the constitutionality of Evidence Code section 1235, which provides for admission of prior inconsistent statements of a witness to prove the truth of the matters asserted therein, as applied to testimony elicited at a preliminary hearing. On the basis of recent decisions of this court and the United States Supreme Court, we conclude that section 1235 as so applied is unconstitutional and therefore the conviction must be reversed.

After a preliminary hearing, defendant was charged with furnishing marijuana to one Melvin Porter, a minor. He was tried and convicted by a court sitting without a jury. The chief witness for the prosecution was young Porter, who was markedly evasive and uncooperative on the stand. He testified that defendant had telephoned him in January 1967 and asked him to sell some unidentified "stuff." He admitted he had obtained 29 plastic "baggies" of marijuana, some of which he sold and the rest of which was purportedly

stolen from him. He testified that he was uncertain how he obtained the marijuana, primarily because he was on "acid" (LSD) at the time and could not then distinguish fact from fantasy. At various points Porter was impeached by the prosecution by the use of his testimony at the preliminary hearing, in which he had stated that defendant had specifically asked him to sell marijuana and that he obtained the marijuana from the yard of defendant's parents' home, at the behest and direction of defendant. This preliminary hearing testimony was admitted as a prior inconsistent statement under section 1235 of the Evidence Code.[1]

Following the deputy district attorney's reading of the preliminary transcript, Porter testified that his testimony at that hearing was the truth as he then believed it, and that his memory was now refreshed and he "guessed" he had obtained the marijuana from defendant's parents' yard and had given the money from its sale to defendant. However, on cross-examination Porter conceded that in fact it was his memory not of the events themselves but of the preliminary testimony which was refreshed, and he was still unsure and had no present recollection of the actual episode.

Later in the trial still another version of Porter's story was offered and admitted. Officer Wade testified that Porter had told him during a conversation at Juvenile Division headquarters that defendant came to Porter's house and personally delivered the marijuana to him. This statement was also admitted under Evidence Code section 1235 as a prior inconsistent state-

[1]We assume for purposes of discussion that the preliminary hearing testimony was in fact "inconsistent" with the witness' testimony at trial.

ment. Like the preliminary hearing testimony, it was admitted for the purpose of proving the truth of the matter stated therein, as then sanctioned by the code.

Only one other item of evidence appeared to link defendant with Porter: the testimony of Officer Dominguez, an undercover officer, that he attempted to buy narcotics from Porter, who told him he would have a supplier named "John" contact him. In fact, defendant contacted Dominguez and purported to be a narcotics supplier; but when defendant insisted that Dominguez take narcotics with him to show good faith, the sale fell through. Defendant admitted the incident but explained that Porter asked him and he agreed to help expose a suspected undercover officer by a bogus sale. Defendant denied ever being in possession of narcotics. No charges were ever filed in connection with this purported transaction, and the trial court carefully limited its admission to the narrow purpose of showing that "Porter and the defendant had previous associations and were acquainted."

Defendant contends that the admission of the prior inconsistent statements of Porter as evidence of the truth of the matters stated therein—as opposed to admission for impeachment only—was unconstitutional and contrary to our recent holding in People v. Johnson (1968) 68 Cal.2d 646 (cert. denied 1969, 37 U.S.L. Week 3259), and that its admission constituted prejudicial error under the standards of Chapman v. California (1967) 386 U.S. 18. The People concede that the testimony of Officer Wade was inadmissible under *Johnson,* but assert that this error was not prejudicial.[2]

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[2]There is no question but that both prior statements were offered, admitted, and considered as evidence of the facts stated

As for the preliminary hearing testimony, the People urge that *Johnson* does not or should not preclude its evidentiary use since defendant had an opportunity to cross-examine the declarant Porter at the time the statement was made. This rationalization is not persuasive.

In *Johnson* we held that Evidence Code section 1235, insofar as it provides for admission of prior inconsistent statements as evidence of the truth of the matters stated therein, is unconstitutional when applied to testimony before a grand jury without the presence of the defendant, his counsel, or the ultimate trier of fact. As a consequence *Johnson* returned California law in this area to the general common law rule which prevailed prior to passage of the Evidence Code, limiting admission of prior inconsistent statements in criminal cases to impeachment purposes. Our decision was impelled by recent cases articulating the right of confrontation guaranteed by the Sixth Amendment to the United States Constitution. (E.g., Pointer v. Texas (1965) 380 U.S. 400; Barber v. Page (1968) 390 U.S. 719.)

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therein. We cannot accept the tardy view propounded in the People's supplementary brief that the court did not rely upon this evidence, and in fact considered only the abortive transaction between defendant and Officer Dominguez as proof of defendant's guilt. In addition to his references to section 1235 at the time of admission, the deputy district attorney urged during closing argument that both these prior statements be considered "as much evidence . . . as if [Porter] said it from the witness stand. . . ." Moreover, we must take note of both the trial court's specific limitation, referred to earlier, of Officer Dominguez' testimony to showing that defendant and Porter were "acquainted," and the fact that the People in their opening brief rely heavily on Porter's statements in supporting the sufficiency of the evidence and specifically assert that the court "nowhere states that it did not believe that portion of Porter's testimony which . . . is sufficient to support the judgment." According to the People, "The trial court simply found that for all of Porter's obstinate evasiveness on the stand, the fact of appellant's furnishing stood clear in his mind." We read the trial court's opinion in accord with this latter statement.

The complaining witnesses in *Johnson* had testified before the grand jury to acts of incest by the defendant. However, at trial these witnesses changed their stories and denied the truth of their prior testimony, claiming they had fabricated the incest charge out of spite. The grand jury testimony was admitted under Evidence Code section 1235, and on the basis of that evidence the defendant was convicted. We reversed, declaring that such evidentiary use of the grand jury testimony was in violation of the confrontation clause of the Constitution. In response to the People's contention that the witnesses could be cross-examined at trial, we stated: "To assert that the dangers of hearsay are 'largely nonexistent' when the declarant can be cross-examined at some later date, or to urge that such cross-examination puts the later trier of fact in 'as good a position' to judge the truth of the out-of-court statement as it is to judge contemporary trial testimony, is to disregard the critical importance of *timely* cross-examination." (Italics in original.) (People v. Johnson (1968) supra, 68 Cal.2d 646, 655.) Belated cross-examination before the trial court, such as was available to defendant in the instant case, is not an adequate substitute for the right to cross-examination contemporaneous with the original testimony before a different tribunal.

We recognize that the case before us differs from *Johnson* in a significant respect. Here, unlike *Johnson*, defendant had an opportunity to cross-examine the witness at the time the prior inconsistent statements were made, i.e., at the preliminary hearing. This, assert the People, is a constitutionally adequate fulfillment of the right of confrontation. However, their contention over-

looks the thrust of our opinion in *Johnson* and the realities of the preliminary hearing system, and directly conflicts with the recent stance of the United States Supreme Court.

Barber v. Page (1968) 390 U.S. 719, cited and relied upon in *Johnson,* involved the "unavailable witness" exception to the hearsay rule. A key witness who had testified at a preliminary hearing was confined in prison elsewhere at the time of trial. The prosecution made little or no effort to compel his presence at the trial, and instead was allowed to read into evidence the transcript of his preliminary testimony. The defendant had not cross-examined the witness at the preliminary hearing, although a codefendant had done so. There was a close question whether the defendant had waived his right to cross-examine at the preliminary hearing, but the court found no waiver and in effect found no opportunity for cross-examination. Concluding that the prosecution had not made a sufficient effort to have the witness present, the court ruled that no unavailability—and hence no "necessity"—was demonstrated to justify the "prior testimony" hearsay exception and to overcome the defendant's right of confrontation.

However, the opinion in *Barber v. Page* did not stop at that point. Since the question of cross-examination and waiver was close, the court went on to make its position unequivocally clear regarding the value of cross-examination at a preliminary hearing in lieu of cross-examination at trial. In language we substantially quoted in *Johnson* (68 Cal.2d at p. 659 fn. 9), the high court stated: "Moreover, we would reach the same result . . . had petitioner's counsel actually cross-examined [the witness] at the preliminary hearing. . . . The

right to confrontation is basically a trial right. *It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial,* simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of testimony at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not . . . such a case." (Italics added.) (Barber v. Page (1968) supra, 390 U.S. 719, 725-726.) This expression was more than a mere dictum, as the Supreme Court has since demonstrated. In Berger v. California (1969) .... U.S. .... [89 S.Ct. 540], the *Barber* "unavailable witness" rule was made retroactive and was specifically applied to a case in which there was an opportunity for cross-examination at the preliminary hearing when the prior testimony was taken.[3]

The import of *Barber* and other recent Supreme Court decisions was spelled out in *Johnson*: "These rulings emphasize the high court's belief in the importance of ensuring the defendant's right to conduct his cross-examination before a *contemporaneous* trier of fact, i.e., before the same trier who sits in judgment on the truth

[3]See also recent California cases which, even without the prompting of *Berger*, have applied *Barber* despite the presence of preliminary hearing cross-examination. (E.g., People v. Harris (1968) 266 A.C.A. 444; People v. Casarez (1968) 263 A.C.A. 132 ["extensively cross-examined"); cf. People v. King (1969) 269 A.C.A. 35 [witness actually unavailable]; Mason v. United States (10th Cir. 1969) .... F.2d .... [4 Cr.L.Rptr. 3099, 3100] [testimony unavailable].)

of the witness' direct testimony as it is spoken from the stand." (Italics in original.) (People v. Johnson (1968) supra, 68 Cal.2d 646, 659, 660.) We reiterate that the "contemporaneous" cross-examination which alone, in the absence of a legal showing of necessity, can be considered fully effective and constitutionally adequate is cross-examination at the *same time* as the direct testimony is given, before the *same trier* as must ultimately pass on the credibility of the witness and the weight of that testimony. In short, cross-examination neither may be *nunc pro tunc* nor may it be *tunc pro nunc.*[4]

In the instant case the only direct testimony of prior statements put before the trial court charged with its evaluation in terms of defndant's guilt, came by means of the deputy district attorney's reading of the cold transcript of the preliminary hearing. That the speaker of the words therein recorded had been cross-examined on another day, before another trier of fact, and for another purpose—i.e., to establish probability, not guilt—was without practical significance to the ultimate trier of fact, and we find the process lacking in constitutional validity. Even had Porter's preliminary hearing cross-examination been read to the trial court —and it was not[5]—it could have been of limited use in

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[4]In Berger v. California (1969) supra, ... U.S. ...., ... [89 S. Ct. 540, 541], the high court stated that *Barber* was "foreshadowed, if not preordained" by *Pointer v. Texas.* Similarly, it could be said that the instant case was "foreshadowed, if not preordained" by *People v. Johnson.* (See People v. Vinson (1969) 268 A.C.A. 728.)

[5]With one insignificant exception, Porter's preliminary cross-examination was not read to the court. Therefore, in this instance the question of "contemporaneous" cross-examination, insofar as it concerned or even reached the ears of the ultimate trier of fact, is more academic than actual.

assessing the value of the statements. It is elementary that the role of cross-examination is not simply to elicit a bald contradiction of the witness' direct testimony, a rare occurrence at best, but to focus the attention of the trier of fact on the witness' demeanor as he relates his story and then defends his version against the immediate challenge of the opposing attorney. By cross-examination "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (Mattox v. United States (1894) 156 U.S. 237, 242-243.) It is because demeanor—attitude and manner—is a significant factor in weighing testimonial evidence that it is axiomatic the trier of fact, before whom the witness testified and was cross-examined at trial, is the sole judge of the credibility of a witness and of the weight to be given his testimony.

Also lost in a cold reading of the preliminary transcript is the more subtle yet undeniable effect of counsel's rhetorical style, his pauses for emphasis and his variations in tone, as well as his personal rapport with the jurors, as he pursues his cross-examination. For example, Judge Leo R. Friedman has written (Essentials of Cross-Examination (Cont.Ed.Bar, 1968) p. 40) that while the lawyer "must keep control of himself . . . [t]his does not mean that the cross-examiner never should fight with a witness, raise his voice, or become angry. Forensic indignation, whether expressed physically or verbally, may produce good results in special

circumstances." In addition, counsel may well conduct his cross-examination in a different manner before a committing magistrate than before a trial court or jury. Thus, states Friedman, counsel must always temper his cross-examination to the individual jurors, using their reactions as a guide to the most effective line of questioning. "The cross-examiner must remember that he is a performer and the jurors are his audience. No good performer ignores his audience, and all performances are conducted for the purpose of favorably impressing the audience." (*Id.* at p. 48.)[6] We conclude that experience demonstrates the esentiality of truly contemporaneous cross-examination.

But leaving aside for the moment questions of subjective evaluation by the trier of fact, the Supreme Court in *Barber* clearly recognized that there is a substantial difference in the nature and purposes of preliminary and trial proceedings, regardless of whether there has been cross-examination. *Barber* points out that the purpose of a preliminary hearing is not a full exploration of the merits of a cause or of the testimony of the witnesses. It is designed and adapted solely to answer the far narrower preliminary question of whether probable cause exists for a subsequent trial.

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[6]Furthermore, we note that under the facts of the instant case, which are far from atypical, not only was Porter's preliminary hearing cross-examination not introduced, but cross-examination at trial regarding his prior statements would have proved futile. Porter asserted that his prior statements may have been what he believed at the time, but he now could not remember the events in question. Defense counsel was thus put in the awkward position of attempting to discredit a witness who had just testified in defendant's favor. If cross-examination of a hostile witness is a delicate process, cross-examination of a friendly witness—as to testimony given at a time when he was hostile—is an unusual exercise in diplomacy and futility.

The judge in preliminary proceedings is not required to be convinced of the defendant's guilt "beyond a reasonable doubt," but need only look for reasonable credibility in the charge against him.[7] *A fortiori* a witness' testimony, though the only evidence adduced, need not be convincing or credible beyond a reasonable doubt, and cross-examination which would surely impeach a witness at trial would not preclude a finding of probable cause at the preliminary stage. Even given the opportunity (see Jennings v. Superior Court (1967) 66 Cal.2d 867), neither prosecution nor defense is generally willing or able to fire all its guns at this early stage of the proceedings, for considerations both of time and efficacy. (Letwin, *Waiver of Objections to Former Testimony* (1967) 15 U.C.L.A. L.Rev. 118, 124.) Indeed, it is seldom that either party has had time for investigation to obtain possession of adequate information to pursue in depth direct or cross-examination.

Were we to equate preliminary and trial testimony one practical result might be that the preliminary hearing, designed to afford an efficient and speedy means of determining the narrow question of probable cause,[8] would tend to develop into a full-scale trial. This would

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[7]Penal Code section 872 provides in relevant part: "If . . . it appears from the [preliminary] examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must [endorse the complaint]." "Sufficient cause" is "equivalent in meaning to 'reasonable and probable cause'" (Perry v. Superior Court (1962) 57 Cal.2d 276, 283), and the evidence before the committing magistrate "need not be such as would require a conviction." (People v. Nagle (1944) 25 Cal.2d 216, 222.)

[8]"The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial." (Jaffe v. Stone (1941) 18 Cal.2d 146, 150.)

invite thorough and lengthy cross-examination, with the consequent necessity of delays and continuances to bring in rebuttal and impeachment witnesses, to gather all available evidence, and to assure generally that nothing remained for later challenge. In time this result would prostitute the accepted purpose of preliminary hearings and might place an intolerable burden on the time and resources of the courts of first instance.[9]

Although we recognize that some of the same practical difficulties exist, nothing we say here is intended to affect or cast doubt upon the viability or constitutionality of the long-established "prior testimony" exception to the hearsay rule. (Evid. Code, §§ 1290-1292.) This exception, as *Barber* points out, adds the factor of necessity to the constitutional aspect of confrontation—which factor may, in appropriate cases, outweigh the lack of contemporary cross-examination.[10] Of course, no such "necessity" exists where the witness is present to testify at trial under oath, but for some disclosed or undisclosed reason does not relate the same

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[9]Approximately 85 percent of felony proceedings in California superior courts originate in preliminary hearings. (Crime and Delinquency in Cal.: Report of Bureau of Criminal Statistics (1965) p. 66.) In the fiscal year of 1966-1967, this represented 64,308 felony preliminary filings in municipal courts and 7,256 in justice courts. (Annual Rep. of Judicial Council of Cal. (1968) pp. 107, 145.)

[10]Evidence Code section 1291 admits former testimony when the present defendant was a party to the hearing at which that testimony was taken "and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he had at the [present] hearing." Although preliminary hearing testimony was clearly contemplated by section 1291 (see comments thereto), the Supreme Court in *Pointer v. Texas* and *Barber v. Page* left open the question whether such prior testimony satisfies the confrontation clause of the Constitution, and we have no occasion to consider that question at this time. (But see People v. King (1969) supra, 269 A.C.A. 35, 42.)

version of events that he told previously and that a party anticipates he will tell.[11] This is strictly a question of *credibility*, to be dealt with, as has always been the case, by the use of immediate and contemporaneous cross-examination and the introduction of the prior inconsistent testimony or statements for purposes of *impeachment*.

In summary, the rules that emerge from the cases and principles are these: cross-examination at trial relating to a statement or testimony given previously is constitutionally inadequate. (*Johnson.*) Cross-examination at the time of the statement, e.g., at a preliminary hearing, before a judge or agency other than the trier of fact charged with the ultimate determination of credibility and guilt, is likewise constitutionally inadequate. (*Barber.*) A combination of these two negatives obviously cannot produce a positive. Therefore, cross-examination at trial on prior testimony, together with cross-examination at the time of the statement before a different trier of fact, is not a valid substance for constitutionally adequate confrontation. The facts in the instant case compose that combination of negatives, compelling us to conclude that defendant was denied the right of confrontation guaranteed by the Sixth Amendment to the Constitution. Both prior statements by

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[11] "It is one thing to use prior testimony or out-of-court declarations under well formulated hearsay exceptions when the witness is dead, incompetent, or out of the jurisdiction. It is an entirely different matter to use such testimony as substantive evidence when the witness is in court and able to testify before the very forum that is going to pass judgment on a defendant who is on trial for his life or freedom. In the former situation, the hearsay is reasonably reliable and is presumably presented to the jury in good faith since it is the only evidence available. In the latter situation the hearsay is no longer reliable, and it is not the only evidence available." (People v. Vinson (1969) supra, 268 A.C.A. 728, 733.)

Porter should have been excluded for any purpose other than impeachment.

We pause to note, as we did in *Johnson* (68 Cal.2d at p. 658), that the Legislature was not unmindful of the likelihood that its overly broad approval of the use of hearsay in criminal cases would have constitutional implications. Thus it provided in Evidence Code section 1204: "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California."

Since the two most damaging statements of the witness Porter are inadmissible as substantive evidence, and since we find no other substantial evidence of a narcotics transaction between Porter and defendant on the date charged, the prejudicial nature of the error is manifest (see fn. 1, *ante*), and the judgment of conviction must be reversed. (Chapman v. California (1967) supra, 386 U.S. 18.) We need not reach defendant's additional contentions of insufficiency of the evidence, suppression of evidence, and prejudicial misconduct.

The judgment is reversed.

Mosk, *J.*

We Concur:

Traynor, *C. J.*
McComb, *J.*
Peters, *J.*
Tobriner, *J.*
Burke, *J.*
Sullivan, *J.*

APPENDIX C

Opinion of the Court of Appeal

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

The People, Plaintiff and Respondent v. John Anthony Green, Defendant and Appellant. Cr. No. 13925.

Filed: Aug. 16, 1968.

APPEAL from a judgment of the Superior Court of Los Angeles County. Prentiss Moore, Judge. Reversed.

Cooney & Cooney, by Terrence W. Cooney, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and David B. Stanton, Deputy Attorney General, for Plaintiff and Respondent.

After a preliminary hearing, defendant was charged by information with violating section 11532 of the Health and Safety Code (furnishing a narcotic to a minor). Defendant pleaded not guilty and waived trial by jury. He was found guilty as charged. A motion for new trial was made and denied, and the defendant was granted probation, subject to certain conditions, among which was that he spend the first year of the five year probationary period in county jail. Defendant appeals from the judgment of conviction.

One Melvin Porter, the minor to whom it was alleged defendant furnished the narcotic, testified for the People. Porter admitted that he had been using marijuana for the two months or so preceding the incident for which defendant was informed against. He

also admitted that he had been using LSD upon occasion and that he had ingested some just prior to the contact with the defendant on the day that it was charged defendant furnished him with the contraband. Porter's testimony at the time of the trial was equivocal and far from helpful. He testified that defendant had called him early in January of 1967 and told him he had some "stuff" that he wanted Porter to sell. Porter also admitted that at about the same time, he had come into possession of 29 plastic bags filled with marijuana, in a large shopping bag. Porter admitted he sold some of the "Baggies" and the rest had been stolen from his closet. At first, Porter was very uncertain as to where he had obtained the marijuana. He then was impeached by the deputy district attorney by having portions of his testimony at the preliminary hearing read to him. The deputy argued that he had the right to introduce this evidence under sections 770 and 1235 of the Evidence Code. In that testimony, Porter stated that defendant called him and told him that he (the defendant) had about a kilo of marijuana in 29 Baggies that he wanted Porter to sell. Porter also testified at the preliminary hearing that defendant told him the marijuana was in the backyard of the home of defendant's parents. Porter also stated that his testimony at the preliminary hearing was the truth as he believed it at that time. He then testified that he guessed that he had procured the marijuana from the place designated by defendant and that he gave the money from the sale of bags to the defendant.

Officer Wade of the Los Angeles Police Department, who was assigned to the Juvenile Narcotics Division, testified that he had had a conversation with

Porter at the Juvenile Division headquarters on January 31, 1967. The deputy district attorney indicated this testimony came in for all purposes, again citing Evidence Code sections 770 and 1235. At that time, Porter said defendant had called him on the morning in question and told him he had a kilo of marijuana and wanted to know if he could bring it over to Porter's home. Later that day, defendant brought over 29 Baggies containing material that looked like marijuana. It was stipulated that Porter told Officer Wade that a similar course of conduct involving defendant's leaving marijuana at Porter's home, and the sale of some of it with the return of the proceeds to defendant, had been going on for the previous six months.

Officer Dominguez of the Los Angeles Police Department also testified. He stated that he had purchased from Porter on January 10, 1967 an item that upon analysis proved to be marijuana. Officer Dominguez also testified to a transaction that he had with defendant: that he had contacted Porter and said he wanted to buy some narcotics; Porter told him that he would contact "John"; thereafter the officer had a phone call from someone identifying himself as the man who had the stuff, and they arranged to discuss the matter at a hot dog stand in the San Fernando Valley; the officer met the defendant, who identified himself as John, as arranged; the defendant told him he would sell him 5 kilos of marijuana and 8 caps of LSD for $500; the defendant then handed the Officer a cup of Coca-Cola with a white powdery substance in it; he told him that it was LSD and requested that he drink it. The Officer refused, saying he had a large amount of money with him and didn't want to be robbed; the

defendant also proposed they go somewhere and smoke a marijuana cigarette; the Officer refused this offer also; defendant said he feared undercover officers and wouldn't sell to anyone who wouldn't take narcotics with him, and no exchange took place.

Porter and the defendant were called as defense witnesses, and both testified that the transaction described by Officer Domingue2 occurred as a test of the Officer. Porter had previously sold him some contraband and was afraid he was an officer. The meeting was set up to test to find out if Porter's apprehensions were justified. The material in the Coke was aspirin. Defendant testified he had nothing to do with narcotics, and he met with the Officer at the request of Porter to help Porter out. There was also defense testimony attacking Porter's credibility and reputation for truth and veracity, and indications that Porter was hostile toward defendant for repossessing a car he had sold him. The defendant in his testimony also denied that he did any of the illegal acts with which he was charged.

Defendant urges three grounds for reversal: (1) the evidence was insufficient to support the judgment; (2) the prosecution suppressed evidence; and (3) certain remarks of the prosecutor constituted prejudicial misconduct.

We do not reach any of the above issues, for we feel reversal is required in the light of the recent California Supreme Court case of *People v. Johnson,* 68 Cal.2d .....* That case held that Evidence Code section 1235, allowing prior inconsistent statements of a witness to be admitted for the truth of the matter asserted, is

*Advance report citation: 68 A. C. 674.

unconstitutional when applied in a criminal prosecution. In the instant matter, with the exception of the grudging acknowledgment by Porter that he "guessed" that the facts were as he testified to at the time of the preliminary hearing, all the substantive elements of the crime charged were proven through prior inconsistent statements. The reading of the testimony given at the preliminary hearing could not come in under the former testimony exception to the hearsay rule because the witness was available. (Evid. Code § 1291.) The statement by the minor to the investigating officer could not come in under the exception to the hearsay rule for declarations against interest for the same reason. (Evid. Code § 1230.) Although under the code it was proper for the prosecution to be allowed to impeach its own witness (Evid. Code §785), it was not proper to allow the evidence to be used as substantive evidence in the case. Since this inadmissible evidence constituted the bulk of the testimony linking the defendant to the crime with which he was charged, we must conclude that the error is reversible within the meaning of *Chapman v. California,* 386 U.S. 18.

The judgment is reversed.

Stephens, *J.*

We concur:

Kaus, *P. J.*

Moore, *J. pro tempore**

*Assigned by Chairman of the Judicial Council.